No. 82225-5

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE and PROTECT OUR WATERS,
Petitioners,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,
Respondent.

ANSWER TO AMICUS CURIAE MEMORANDUM OF FLUORIDE CLASS ACTION

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1. INTRODUCTION

Respondents City of Port Angeles ("City") and Washington Dental Service Foundation, LLC ("WDSF") submit this joint Answer To Amicus Curiae Memorandum of Fluoride Class Action ("FCA"). Respondents request the Court to deny review of the decision of the Court of Appeals in *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 188 P.3d 533 (2008).

The Court of Appeals decision is solidly founded on controlling Washington Supreme Court precedent. Based on the undisputed facts found by the trial court, the Court of Appeals held that the initiatives filed by the political action committees Our Water-Our Choice ("OWOC") and Protect Our Waters ("POW") were outside the scope of the local initiative power for two independent reasons. First, the proposed initiatives interfered with the City Council's authority to manage its municipal water system, which is specifically delegated to the "legislative body" of the City by RCW 35A.11.020. Second, the proposed initiatives are administrative, not legislative, in nature because City decisions regarding additives to drinking water are done pursuant to a detailed regulatory plan adopted and administered by the State Department of Health and Board of Health. The Court of Appeals' reliance on Supreme Court precedent in its

decision does not raise an issue of substantial public interest that should be determined by the Supreme Court.

FCA's amicus brief fails to show any reason to grant the petition for review. Rather, FCA largely fails to address the case before this Court. Instead, FCA asserts supposed facts and studies that were not presented to or found by the trial court; are not in the appellate record; and were not the basis for the Court of Appeals' decision. FCA also relies on irrelevant non-Washington rulings, all of which were rendered long before the passage of the federal Safe Drinking Water Act and the Washington statutes and regulations implementing that Act.

FCA also attempts to use this case as a vehicle to broadcast its views about the wisdom of fluoridation. This case has never been about whether fluoridation of a municipal water supply is a wise policy choice or whether the safeguards and regulations adopted by the Washington Board of Health and Department of Health are the appropriate regulations. Rather, this case is solely about whether the proposed initiatives presented to the City of Port Angeles were within the scope of the local initiative power under Washington law. FCA's anti-fluoride advocacy adds nothing to the merits of this Court's consideration of the Petition for Review.

2. REQUESTED RELIEF

The Respondents request that the Court deny the petition for review supported by FCA and filed in this case by OWOC and POW.

3. ARGUMENT

3.1 Amicus' Memorandum Mischaracterizes the Issues Decided by the Court of Appeals and Relies On Supposed Facts and Studies That Are Not in the Appellate Record.

In its amicus curiae memorandum, FCA relies on supposed facts, conclusions and studies that were not presented to the trial court, are not in the appellate record, and are not the basis for Division Two's published opinion. For that reason alone, the amicus brief cannot be helpful to this Court in deciding whether to grant review. The record below is particularly relevant here, as it is upon that record that the Supreme Court declined once to accept direct review.[1]

FCA repeatedly mischaracterizes the record and issues in this case. This case concerns the validity of local initiatives, not, as FCA asserts, whether the Port Angeles City Council has "sole authority to decide whether or not drugs including fluoride can be added to all public water supplies serving the city."[2] There was no evidence presented at trial, and no evidence in the appellate record, showing that any other drinking water

[1] Order dated October 31, 2007, under S.Ct. No. 79812-5 (declining direct review and transferring to Division II of the Court of Appeals).

additive including fluoride is a regulated as a "drug." Rather, the uncontested evidence in this matter shows that the United States Food and Drug Administration ("FDA") and the Environmental Protection Agency ("EPA") treat Section 1412 of the federal Safe Drinking Water Act as giving the EPA "exclusive control over the safety of public water supplies." The federal agencies charged with enforcement of the relevant statutes acknowledge that the Safe Drinking Water Act repealed any FDA authority to regulate water used for drinking water purposes. FDA Memorandum of Understanding 225-79-2001.[3] Fluoride is not a "drug" subject to FDA regulations for public water systems.

Consistent with that federal model, the regulations of the State Department Health similarly regulate all additives to drinking water similarly. Fluoride and other inorganic and organic substances are regulated as additives and natural components of public drinking water. WAC 246-290-220. Detailed monitoring regulations and specific maximum levels have been set for numerous inorganic and organic substances, including fluoride. WAC 246-290-300; WAC 246-290-310. Specific approvals, monitoring and sampling requirements are required for fluoridation treatment systems. WAC 246-290-460.

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[2] Memorandum at 3.

FCA also misstates the issue decided by the Court of Appeals. That court did not hold that the Port Angeles City Council had "sole authority" to determine additives to drinking water. In fact, the opposite is true. The court discussed the federal EPA regulation of all public water systems in the United States under the Safe Drinking Water Act,[4] and the State of Washington's primacy to implement that federal statute. In Washington, the Department of Health ensures compliance with the Safe Drinking Water Act, and the State Board of Health is charged with regulating public water systems. RCW 70.119A.080; RCW 43.20.050(2)(a). Rather than sole authority, the City Council administers its public water system pursuant to the programs and regulations established by the Department of Health and Board of Health. *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 220, 151 P.3d 1079 (2007) (City's decision to fluoridate its drinking water is an action under a program administered by the Department of Health).

In its Memorandum, FCA goes on at length about the supposed effects of fluorides, citing a National Research Institute report that was not

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[3] Respondents' Clerks Papers at 180.

[4] The Safe Drinking Water Act was enacted in 1993 as Publ. L. 93-523 and is codified at 42 U.S.C. §300g-1 *et seq.*

presented in evidence and is not in the appellate record. That material and discussion are clearly inappropriate, not only because the referenced study is outside the record but also because it is not relevant to the issues in this case. (The National Research Institute study also concerned itself with naturally occurring fluoride, not fluoridation of public drinking water systems.) As respondents have repeatedly emphasized, and the Court of Appeals recognized, this case is not about the merits of fluoridation of drinking water and is not about the wisdom of the Board of Health's science-based standards for fluoride in drinking water. Neither of those issues were presented to the trial court or the Court of Appeals. The only issue before the trial court and the Court of Appeals was whether the particular initiatives presented to the City were within the scope of the local initiative power. FCA's anti-fluoridation advocacy does not assist the Court and certainly does not show that there is an issue of substantial public interest that should be determined by the Supreme Court.

3.2 Under Settled Supreme Court Precedent, the Proposed Initiatives Interfere With Authority Expressly Granted to the City Council.

A local initiative is beyond the scope of the initiative power if it interferes with powers or functions that have been granted by the Legislature to the governing body of a city, rather than to the city as a corporate entity. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261-266,

138 P.3d 943 (2006) (initiative requiring revenue bonds to be subject to voter ratification interfered with the authority granted to the city's legislative authority over revenue bonds); *Priorities First v. City of Spokane*, 93 Wn. App. 406, 410-11, 968 P.2d 431 (1998), *review denied*, 137 Wn.2d 1035 (1999) (initiative requiring vote prior to creating a public development authority interfered with the authority granted to the city legislative body to create a special fund for municipal facilities).

In this case, the Court of Appeals held that the proposed initiatives would interfere with the Port Angeles City Council's authority to supply municipal water utility services, as delegated specifically to the City Council by the Legislature in RCW 35A.11.020. That statute expressly grants to the "legislative body" of a code city the power of:

> operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns.

RCW 35A.11.020. The undisputed facts showed that the proposed initiatives would interfere with the operation of the City's water utility. The POW petition, for example, requires that all additives added to drinking water must be independently analyzed on a batch-by-batch basis, which is inconsistent with the procedural requirements of the Washington Department of Health. WAC 246-290-300. The POW petition requires that all substances added to drinking water affecting physical or mental

health must be approved by the U. S Food and Drug Administration ("FDA"). The petition fails to reconcile this provision with the fact that the FDA does not regulate additives to drinking water. FDA MOU 225-79-2001 (FDA and federal Environmental Protection Agency agreement that federal Safe Drinking Water Act of 1974 repealed FDA's authority over water used for drinking water purposes); *see* Pub. L. 93-523. The Court of Appeals applies this Court's long-established standards in rejecting the initiatives.

The Court of Appeals' decision relied on settled Supreme Court case law. *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2007) (referendum on critical area ordinance was invalid because Legislature had delegated GMA regulatory authority to local legislative body); *see City of Seattle v. Yes For Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004), *review denied*, 153 Wn.2d 1228 (2005) (even though general authority to regulate creeks existed, initiative to zone creek areas impinged on authority to enact development regulations that was designated to local legislative body).

In its Memorandum, FCA ignores the controlling test from this Court's precedent. Instead, FCA cites only to a 1975 Ohio case and a 1961 Iowa case, *City of Canton v. Whitman*, 44 Ohio St.2d 62, 337 N.E.2d 766 (1975) (Ohio Director of Environmental Protection could

require city to fluoridate public water supply); *Wilson. v. City of Council Bluffs*, 253 Iowa 162, 110 N.W.2d 569 (1961) (city ordinance providing for fluoridation of public water supply was lawful). Neither of those cases apply the controlling tests for delegation to the local legislative authority from *Washington* case law; and neither of those cases is remotely relevant to the issues before this Court. The only issue in this case is the scope of the local initiative power granted by the State Legislature under *Washington* law. This Court has long recognized that Washington cities and counties have only those powers granted them by the Washington Legislature. *E.g., Seattle Building and Construction Trades Council v. City of Seattle*, 94 Wn.2d 740, 620 P.2d 82 (1980). Cases regarding the power of local governments in other states are not relevant, and the cases cited by FCA are inapplicable.

In sum, FCA has not shown that the Court of Appeals' reliance on settled Washington Supreme Court case law raises any substantial public interest that should be decided by the Supreme Court.

3.3 Under Settled Supreme Court Precedent, the Proposed Initiatives Are Outside the Initiative Power Because They Are Directed at Administrative, Not Legislative, Subjects.

The local initiative power is limited to actions that are legislative in nature. *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1981). A local government action is administrative if (1) it is pursuing a plan that

the local government itself has adopted, or (2) the local government action is in pursuit of a plan adopted by some power superior to it. *Ruano*, 81 Wn.2d at 823-24; *Heider v. City of Seattle*, 100 Wn.2d 847, 876, 675 P.2d 597 (1984). The Court of Appeals relied on that settled precedent in holding that the actions contemplated by the proposed initiatives are administrative in nature.

Here, the Legislature has charged the State Board of Health with establishing drinking water standards. RCW 43.20.050(2)(a); RCW 70.142.010. The Department of Health and Board of Health have adopted detailed standards for additives to drinking water, including fluoride, in Chapter 246-290 WAC. Those regulations contain specific limitations on additives, and specific and detailed monitoring and sampling requirements. *E.g.*, WAC 246-290-300; WAC 246-290-310; WAC 246-290-460. The City's standards and decisions regarding its municipal water utility are taken pursuant to that detailed regulatory program adopted by a "power superior to" the City's actions are administrative in nature. Because the proposed initiatives affect those same actions, they are administrative in nature and beyond the scope of the initiative power.

FCA does not address the settled standards from Washington case law and controlling Washington precedent. Instead, FCA cites to an irrelevant 1965 California case. *Hughes v. City of Lincoln*, 232 Cal. App.

2d 74, 43 Cal. Rptr. 306 (1965) (under 1960s California law, city's decision to fluoridate water supply was legislative action). That case is irrelevant because it applies standards from California in the 1960s. The case was also decided prior to the enactment of the comprehensive federal and state regulatory programs under which the City operates its water utility. *E.g.*, 42 U.S.C. 300G-1 *et seq.*; 40 CFR Part 41; Chapter 70.119A RCW; Chapter 70.142 RCW; Chapter 246-290 WAC.

FCA admits that decisions regarding all other additives except fluoride would be administrative in nature, but fluoride is somehow different because it is supposedly a "medicine and drug."[5] FCA cites no authority for this distinction. As discussed above, State Department of Health and Board of Health regulations treat all contaminants to drinking water similarly, and fluoride in drinking water is not regulated as a drug by either the FDA or by the Department of Health.. See WAC 246-290-300; WAC 246-290-310; FDA MOU 225-79-2001. FCA's reach for irrelevant authority demonstrates its lack of understanding of the regulatory measures that control the City's drinking water system. FCA's reference to water districts are equally irrelevant to cities.

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[5] Memorandum at 7.

FCA relies on RCW 57.08.012, claiming that this statute shows that decisions regarding fluoridation are legislative rather than administrative. FCA is incorrect in several respects. First, this statute governs only water districts, not cities. The City of Port Angeles is a city governed by Title 35A RCW, the Optional Municipal Code, and is not a water district governed by Title 57 RCW. Second, the statute merely allows the commissioners of a water district to submit to the district's electors the proposition of fluoridation of the district's water supply. This says nothing about whether that district decision is legislative or administrative in nature – the Legislature merely allows the water district commissioners to submit it to a vote, and a vote is not required if requested by the electors. Third, the proposed initiatives in this case go far beyond a decision about whether to fluoridate the City's water supply and would enact detailed procedural requirements, inconsistent with state regulations, that the City would have to follow when managing its water utility.

Finally, FCA claims broadly that the decision that the initiatives are administrative in nature has "disenfranchised" the City's voters. Again, FCA is incorrect. The Court of Appeals merely decided that the initiative petitions from OWOC and POW are outside the scope of the initiative power: This decision followed settled Supreme Court case law

on the scope of the local initiative power. *E.g., 1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2007) (rejecting referenda on critical areas ordinance because Legislature had delegated GMA planning and regulatory authority to local legislative body). Just as in *McFarland*, the fact that a decision is not within the scope of the initiative power does not disenfranchise local voters. Those voters are still empowered to elect representatives to undertake the administrative actions that the voters desire.

The Court of Appeals' decision that the initiatives address administrative subjects relied on settled Washington Supreme Court authority. FCA's reliance on irrelevant California case law and inapplicable statutes fails to show that there is a substantial public interest that should be decided by the Supreme Court.

3.4 The Issue of Whether the Proposed Initiatives Are Within the City's Power to Enact Was Not Decided by the Court of Appeals and Is Not Part of the Supreme Court's Review.

A third test for the scope of the local initiative power is whether the subject matter of the initiative is within the local government's power to enact. This is sometimes called the "substantive invalidity" test. *See Seattle Building and Construction Trades Council v. City of Seattle*, 94 Wn.2d 740, 747, 620 P.2d 82 (1980). The Court of Appeals discussed the Supreme Court's treatment of *statewide* initiatives versus *local* initiatives

with respect to this "substantive invalidity" test. However, the Court of Appeals specifically declined to decide the case on that issue:

> [W]hile differences between state-wide and local initiatives arguably dictate that a court should employ different methods of preelection review, in this case it is unnecessary for us to decide this point. Both initiatives clearly fail because they are administrative in nature and improperly infringe on rights delegated by the legislature to the city council.

Court of Appeals Decision at 10 (attached at App. A hereto).

In discussing the regulatory background of drinking water standards, the Court of Appeals did discuss Chapter 70.142 RCW. The Court of Appeals correctly noted that the State Board of Health has been delegated the authority to set maximum contaminant standards for all drinking water in the state. RCW 70.142.010. The only exception to this delegation to the State Board of Health is in RCW 70.142.040, which allows health departments in counties with a population of over 125,000 to establish more stringent standards based on best available scientific information. This exception would have no meaning if *any* legislative body could establish drinking water standards, whether or not those standards were based on science. Accordingly, it is correct that the City of Port Angeles would not have authority to impose water quality standards more strict than the science-based standard promulgated by the State Board of Health. The Court of Appeals, however, did not base its decision

on whether the City had the power to enact the proposed initiatives, which include non-science-based standards that are inconsistent with the standards promulgated by the State Board of Health.

In spite of the fact that the Court of Appeals did not reach this issue, FCA invites the Court to issue an advisory opinion regarding pre-election review of local initiatives for substantive invalidity. The Court should decline that invitation. On petition for review, the Court should consider the issues actually decided by the Court of Appeals, and whether those issues meet the standard for accepting review. The Court of Appeals actually decided that the initiatives were invalid for two separate reasons that were independent of the substantive invalidity test: the initiatives involve administrative action and the initiatives would interfere with powers delegated to the City Council. As discussed above, those issues do not meet the standard for accepting review, and this Court should not accept review of a case regarding an issue that was not decided, and was not required to be decided, by the Court of Appeals.

4. CONCLUSION

For the reasons set forth above, and for the reasons in the Answer To Petition For Review, Respondents respectfully request that the Court deny the Petition For Review submitted by political action committees Our Water-Our Choice and Protect Our Waters in this case.

RESPECTFULLY SUBMITTED this 5th day of January 2009.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF PORT ANGELES, Respondent, v. OUR WATER-OUR CHOICE; and PROTECT OUR WATERS, Appellants, v. WASHINGTON DENTAL SERVICE FOUNDATION, LLC, A Party in Interest,	No. 36935-4-II PUBLISHED OPINION

PENOYAR, J. — Our Water-Our Choice and Protect Our Waters, appeal a trial court decision ruling their initiatives invalid. Both initiatives deal with controlling additives to Port Angeles' public water supply. Courts do not review initiatives for whether the proposed law is good public policy but do review initiatives for whether they would be lawful if approved. Unlike statewide initiatives, trial courts review the substance and nature of local initiatives before they are submitted to the voters because local initiatives must be consistent with federal and state laws. The trial court found the initiatives invalid because they were administrative in nature, they exceeded local initiative power because the legislature specifically delegated

authority to operate the city water system to the city council, and the city had no power to enact ordinances such as those represented by the initiatives. We agree with the trial court and hold the initiatives invalid.

FACTS

In 2003 the Port Angeles City Council decided to fluoridate the City's water system at the urging of local health care professionals. In 2005, the council passed a motion approving a contract with the Washington Dental Service Foundation (WDSF). The contract provided that WDSF would construct and install a fluoridation system, and the city agreed to operate the system for 10 years or pay the foundation $343,000 for the system. Clallam County Citizens for Safe Drinking Water challenged the council's decision that the fluoridation system was categorically exempt from environmental review under the State Environmental Policy Act. We ultimately upheld the council's decision in a previous appeal. *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 220, 151 P.3d 1079 (2007).

Meanwhile, each of the appellants in this case filed an initiative, the effect of which, if enacted, would prohibit the city from adding fluoride to the public water supply. The Our Water-Our Choice initiative, the "Medical Independence Act," would prohibit the city from adding to the water supply any substance designed to treat mental or physical disease or which would affect the function or structure of the human body. Appellant's Clerk's Papers (ACP) at 10-11. The Protect Our Waters initiative, the "Water Additives Safety Act," would criminalize the addition of any substance intended to treat or affect the mental or physical health of a person

unless the Food and Drug Administration specifically approved the substance for use in public water systems.[1] ACP at 12-13.

Port Angeles (City) filed a declaratory judgment action, asking the trial court to rule that the initiatives were beyond the local initiative power. The Committees responded with a mandamus action seeking an order requiring the City to place the initiatives on the ballot. The parties agreed to consolidate the actions and try the case on undisputed facts.[2] The trial court ruled that the City's decision to fluoridate the water was administrative and thus beyond the local initiative power. The trial court also concluded that the initiatives exceeded the local initiative power because the legislature specifically delegated to the city council the authority to operate the city water system, and because the City had no power to enact ordinances such as those represented by the initiatives.

The Committees sought direct review by the Supreme Court, which declined to grant review and transferred the case to us.

ANALYSIS

I. PREELECTION REVIEW OF INITIATIVE

The Committees challenge the trial court's conclusions of law and its judgment based on those conclusions of law. At trial, the court determined that both initiatives were invalid because (1) they sought to regulate matters administrative in nature, (2) they improperly interfered with

[1] Our Water-Our Choice and Protect Our Waters will be collectively referred to as "Committees" in this opinion.

[2] Both county superior court judges recused themselves, and Judge Karlynn Haberly from Kitsap County was appointed as a visiting judge.

the City's legislatively granted right to operate the public water system, and (3) they exceeded the City Council's lawmaking authority.

A. Standard of Review

We review issues of law de novo. *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994).

Preelection review of an initiative is disfavored, but appropriate when the initiative is beyond the scope of the initiative power. *Coppernoll v. Reed*, 155 Wn.2d 290, 301, 119 P.3d 318 (2005). An initiative is generally within the initiative power if it meets two requirements: It is "legislative in nature," and it would enact a "law that is within the [state/city's] power to enact." *Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007); *Coppernoll*, 155 Wn.2d at 302; *see also Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719, 911 P.2d 389 (1996). Generally, an act is "legislative" if it creates a new policy or plan, while an act is only "administrative" if it "merely pursues a plan already adopted by the legislative body itself, or some power superior to it." *Bidwell v. City of Bellevue*, 65 Wn. App. 43, 46, 827 P.2d 339 (1992) (quoting *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 748, 620 P.2d 82 (1980)); *see also Heider v. City of Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984); *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973).

Additionally, initiative rights do not extend to matters that state law delegates exclusively to local legislative authorities. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 264, 138 P.3d 943 (2006); *Whatcom County v. Brisbane*, 125 Wn.2d 345, 350, 884 P.2d 1326 (1994). With respect to the power to enact a law, a state initiative must be within "the scope of the state legislative power." *Coppernoll*, 155 Wn.2d at 301. Local initiatives, in turn, must be within the *local* legislative power.

B. Fundamental and Overriding Purpose

The Committees urge us to hold that the trial court erred in its conclusions of law by reviewing more than just the "fundamental and overriding purpose" of the initiative to determine both whether they are legislative and whether their purpose is within the City's power to enact. Appellant's Br. at 20. The Committees argue that per *Coppernoll*, the court must limit its preelection inquiry to only the "fundamental and overriding purpose of the initiative":

> In *Philadelphia II*, we used a two part test to determine whether the initiative exceeded the legislative power. '[I]n order to be a valid initiative, [an initiative] must be legislative in nature and enact a law that is within the [jurisdiction's] power to enact.' . . . We looked at the 'fundamental and overriding purpose' of the initiative rather than mere 'incidentals' to the overriding purpose.

Coppernoll, 155 Wn.2d at 302 (citations omitted).

The Committees argue that *Coppernoll*'s use of "fundamental and overriding purpose" extends to the court's entire review of an initiative, and that this standard applies not only to determine whether the initiative is within the city's power to implement, but also to decide the legislative/administrative issue. *Coppernoll* does state that when reviewing a state-wide initiative to determine if it is in the state's power to enact, the court should review only the "fundamental and overriding purpose" of the initiative. 155 Wn.2d at 303. A close reading of *Coppernoll* reveals that the court does not suggest that the same "fundamental and overriding purpose" test applies in determining whether an initiative's purpose is legislative in nature. Instead, the opinion connects the "fundamental and overriding purpose" language solely to the

determination of whether the initiative is within the State's power to enact.[3] 155 Wn.2d at 303.

This reading of *Coppernoll* is further confirmed by the Washington Supreme Court's subsequent decision in *Futurewise v. Reed*, where it states:

> If an initiative otherwise meets procedural requirements, is legislative in nature, and its "fundamental and overriding purpose" is within the State's broad power to enact, it is not subject to preelection review.

161 Wn.2d at 411 (citing *Coppernoll*, 155 Wn.2d at 302-03).

In sum, an initiative must be both legislative in nature and within the locality's power to enact. After examining *Coppernoll* and *Futurewise*, it is clear that a court may review more than the "fundamental and overriding purpose" of the initiative when determining whether it is legislative or administrative in nature.[4]

C. The Committees' Initiatives are Administrative in Nature

Public water systems operate under a complex regulatory scheme. The federal Environmental Protection Agency (EPA), through its Office of Ground Water and Drinking Water, regulates all public water systems in the United States under the Safe Drinking Water Act

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[3] In *Coppernoll* there was no question that the initiative was legislative in nature. Thus, *Coppernoll* concludes: "In adherence to our prior decisions, we therefore restrict analysis of I-330 to determining if its 'fundamental and overriding purpose' is within the state's power to enact." *Coppernoll*, 155 Wn.2d at 303. The court makes no similar assertion for determination of whether an initiative is legislative or administrative.

[4] Additionally, we note that the trial court did not make a finding as to the fundamental and overriding purpose of the initiatives, and the Committees did not request that the court make one. Only now do they assert that the fundamental purpose of their initiatives is to "prohibit pollution of all public water systems serving [Port Angeles] and to protect health and safety" of its citizens by either prohibiting the addition of medications to the water supply or by strictly monitoring those medications deemed appropriate. Appellant's Br. at 21. This is an assertion which the City challenges by noting that the purpose of the initiatives is to "halt fluoridation of the City's water supply." Resp't's Br. at 18. The trial court is the proper body to determine the initiatives' purpose, though, for our purposes, such a determination of fundamental and overriding purpose is unnecessary as the initiatives fail on other grounds.

(Act). The EPA sets national standards for drinking water, but generally, the direct oversight of public water systems is conducted by the states. Under the Act, a state can apply to implement the Act by agreeing to set standards at least as stringent as the federal standards and then enforce those standards.

The EPA granted Washington primacy to implement the Act (primacy has been granted to all but one state). *See* RCW 70.119A.080 (Department of Health ensures compliance with Safe Drinking Water Act). The State Board of Health is charged with regulating the purity of public water systems. RCW 43.20.050(2)(a). The legislature created a single exception, allowing the local health departments in every county with a population larger than 125,000 to "establish water quality standards for its jurisdiction more stringent than standards established by the state board of health," should it choose to do so. RCW 70.142.040. This statute, however, does not apply here.[5]

Given this legal framework, the trial court's determination that the Committees' initiatives are administrative in nature is correct. Each initiative would regulate additives to Port Angeles' public water system. The Committees argue that the initiatives merely add new restrictions not already found in the regulatory scheme and thus create new law (i.e. legislative, not administrative). This argument fails. Under the Department of Health's regulatory scheme, the test here is whether the only decisions left are administrative in nature. *Ruano*, 81 Wn.2d at 824-25.

As we previously held in *Clallam County Citizens*, the City's initial proposal to fluoridate its water was an action under a program administered by the Department of Health. 137 Wn.

[5] Port Angeles is not a county and does not have more than 125,000 residents.

App. at 220. The Department of Health has authority under RCW 70.119.050 to adopt rules and regulations relating to public water systems. Decisions by local water companies about which chemicals to add to public water systems are administrative in nature because those decisions merely implement plans already adopted and supervised by the Health Department. WAC 246-290.[6] Here, the City itself lacks the authority to add additional legal restrictions; thus, any decisions regarding the purity of public water systems are administrative in nature.

Additionally, the Committees argue that their initiatives are legislative in nature because the City itself does not have an ordinance expressly setting permissible maximum levels for drinking water additives and testing methods. Thus, they argue, their proposed initiatives must be legislative because they would set local maximum levels for fluoride and other additives as well as provide testing standards for those additives. This argument also fails. The standard is not whether the City itself has adopted a plan regulating the additives, but whether a plan has already been adopted "by the legislative body [of the city] itself or some power superior to it." *Heider*, 100 Wn.2d at 876. Here, both the Washington Legislature and the Washington Board of Health are powers superior to the City and their comprehensive regulations constitute a plan regulating additives to public drinking water. Thus, the City's actions implementing that general plan are administrative, not legislative. Since the initiatives seem to pursue/affect a plan already in place, they are administrative in nature and therefore invalid.

D. Initiatives Not Within the City's Power to Enact

The trial court ruled, additionally, that the initiatives were not within the City's power to enact. The Committees argue that the trial court erred in this conclusion as it should not have

[6] This WAC describes all of the rules and regulations a public water system provider must comply with.

looked beyond the fundamental and overriding purpose of the initiatives in making its conclusion. They argue that by looking only at the overriding purpose, the measures are within the City's power to enact. The City disagrees, noting that though this State has adopted the method of reviewing only the fundamental and overriding purpose of an initiative—to determine whether a state has the power to enact a *state-wide* initiative—it has not extended this test to review of local initiatives.

The City is correct that the Supreme Court has not yet discussed limiting their preelection review of local initiatives (to determine whether they are within a city's power to enact) to only the fundamental and overriding purpose of the initiative. The City argues that we should not extend the "fundamental and overriding purpose" test to preelection review of local initiatives because of the basic differences in the right of initiative between state-wide and local initiatives.

Though the right to state-wide initiative is protected by our state constitution, there is no similar constitutional protection or right of local initiative. WASH. CONST. art. II, § 1. The legislature did not grant optional initiative powers in noncharter code cities, such as Port Angeles, until 1973. RCW 35A.11.080; 1973 Wash. Laws, 1st Ex. Sess. Ch. 81 § 1. Besides this basic difference, there is a practical difference between the two types of initiatives that warrants different types of preelection review.

Where a state-wide initiative creates new state law, binding upon all, a local initiative can only create new law that is not inconsistent with or inapposite to state and federal law. *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747. Where substantive review of a state-wide initiative is inappropriate, a similar review for a local initiative is warranted given the greater restrictions placed upon them. The City properly cites to several cases where the Washington Supreme Court has undertaken a substantive review of local initiatives or referendums to

determine whether they were within the cities' power to enact. *See Seattle Bldg. & Const. Trades Council*, 94 Wn.2d 740 (local initiative purporting to prohibit bridge across Lake Washington in the City of Seattle was beyond the scope of the local initiative power because it was inconsistent with the exclusive method provided in chapter 47.52 RCW for determining location of limited access routes); *Close v. Meehan*, 49 Wn.2d 426, 430-32, 302 P.2d 194 (1956) (local initiative that would have changed the site for a proposed sewage treatment plant was beyond the scope of the local initiative power because it violated the sewage treatment plant planning requirements of RCW 80.40.070).

Though both cases are on point, they were both decided by the court well in advance of its decisions discussing preelection review of the fundamental and overriding purpose of initiatives.[7] Furthermore, while differences between state-wide and local initiatives arguably dictate that a court should employ different methods of preelection review, in this case it is unnecessary for us to decide this point. Both initiatives clearly fail because they are administrative in nature and improperly infringe on rights delegated by the legislature to the city council.

E. Delegation to City Legislative Body

The trial court correctly determined that the initiative power does not extend to regulating public water systems because the legislature granted city legislative bodies the power to operate water utilities. *See* RCW 35A.11.020 ("The legislative body of each code city shall have all

[7] The court decided *Philadelphia II* in 1996, *Coppernoll* in 2005, and *Futurewise* in 2007.

powers . . . [necessary for] operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns.").[8]

As the Washington Supreme court recently explained in *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 174, 149 P.3d 616 (2006), when the legislature clearly delegates power to a local legislative body as opposed to the city as a whole, referendums and initiatives that attempt to limit or modify that power are beyond the initiative power. The *1000 Friends* court reaffirmed its holding in *Brisbane*, 125 Wn.2d 345, that the legislature granted the local legislative body the power to implement the Growth Management Act (GMA), and thus local citizens may not exercise the referendum or initiative power to limit, modify, or overturn a local legislative body's actions under the act. *1000 Friends*, 159 Wn.2d at 174-75. Likewise, zoning decisions cannot be made by referendum or initiative because that power was expressly delegated to the local legislative body. *Lince v. City of Bremerton*, 25 Wn. App. 309, 312-13, 607 P.2d 329 (1980). The legislature in RCW 35A.11.020 clearly delegated the authority to operate a municipal water system to local legislative bodies rather than local municipal corporations. This delegation placed the operation of a municipal water system beyond the initiative power.[9]

The Committees urge us to discount the grant of power through RCW 35A.11.020, and instead find that the initiative is valid because the corporate city has the power to regulate water pollution through its police power. Chapter 35.88 RCW. Division One found a similar argument

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[8] It is well settled that in the context of statutory interpretation, a grant of power to a city's governing body ("legislative body") refers exclusively to the mayor and city council and not the electorate. *City of Sequim*, 157 Wn.2d at 266.

[9] WAC 246-290 dictates how a municipal/public water system should be run. It further dictates water quality standards and testing procedures.

in *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004), unpersuasive. Similarly, we are not persuaded by the Committees' argument in this case.

In *Yes for Seattle*, creek protection activists proposed an initiative to place development restrictions on property near creeks. The court held that this was a development regulation as defined by the GMA and that the legislature had granted authority to a city's legislative body to enact GMA development regulations, not to the city as a corporate body. 122 Wn. App. at 389. The activists argued that besides the GMA, there were broad grants of authority to cities generally for regulating creeks. For example, RCW 35.21.090 granted authority to cities to manage watercourses; RCW 35.31.090 granted authority to cities to regulate pollution in streams; and article XI, section 11 of the Washington Constitution granted authority to cities to make all regulations not inconsistent with state laws. *Yes for Seattle*, 122 Wn. App. at 392. Division One held that these grants of authority were not controlling, because the creek activists' proposed initiative would interfere with the legislature's *specific* grant of power to the legislative body of the city to enact development regulation. *Yes for Seattle*, 122 Wn. App. at 392.

As with the GMA, the legislative grant of authority to the legislative body of the city to "[operate] and [supply] utilities" is explicit. RCW 35A.11.020. The legal test for the validity of a local initiative is not whether some general law might supply authority to the city as a corporation, but whether the proposed initiative would "interfere with the exercise of a power delegated by state law to the governing body of the city." *Priorities First v. City of Spokane*, 93 Wn. App. 406, 411, 968 P.2d 431 (1998). Put another way, the people cannot deprive the City's legislative authority of the power to do what the constitution and/or a state statute specifically permit it to do. *King County v. Taxpayers*, 133 Wn.2d 584, 608, 949 P.2d 1260 (1997). To allow the initiatives to proceed on the basis of police power, or some other general theory, would

be to undermine the legislative grant of authority to the local legislative body and the complex regulatory scheme public water systems operate under.[10]

III. ADDITIONAL FINDINGS OF FACT

The Committees assign error to the trial court's failure to adopt an additional finding of fact at presentment on January 19, 2007. This proposed finding of fact, 3.20, reads: "There are other public water systems besides the Port Angeles municipal water system that provide water service in the City of Port Angeles." Appellant's Br. at 13. Instead of asking us to hold that the trial court abused its discretion in not including the finding of fact, the Committees encourage us to adopt the missing finding of fact on our own. We decline to address this as it would not change our decision that the initiatives are administrative and beyond the scope of initiative power.

IV. ELECTION SHOULD NOT BE ORDERED

Because the trial court ruled properly that the initiatives are invalid, we will not issue a decree pursuant to RCW 35.17.290 to place the initiatives on the ballot.

V. ATTORNEY FEES

The Committees request attorney fees and costs should they prevail on appeal. The City (and WDSF) does not make a request for fees. Since the City prevailed on appeal, it is entitled to costs and the Committees are not. RAP 18.1.

[10] The Committees urge us to "harmonize" RCW 70.142.040 with chapter 35.88 RCW. Appellant's Reply Br. at 5. Given the explicit grant of power, harmonizing the statutes is unnecessary.

We affirm the trial court.

Penoyar, A.C.J.

We concur:

Houghton, J.

Hunt, J.